ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
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August 8, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Filing

Magalie Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, **CC Docket No. 96-128**

Dear Ms. Salas:

I have enclosed for filing two copies of a letter I sent today to Chairman Kennard in reference to the above-captioned docket. In accordance with 47 C.F.R. § 1.1206(b)(1), please include this letter in the record of this proceeding.

If you have any questions concerning this matter, please contact me at (202) 326-7900.

Sincerely,

Michael K. Kellogg

Michael K. Kellogg

Enclosure

No. of Copies rec'd 0+1
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August 8, 2000

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, **CC Docket No. 96-128**

Dear Chairman Kennard:

The D.C. Circuit Court of Appeals has now affirmed the per-call compensation rate for calls made from payphones. In light of that decision, there is no remaining obstacle to immediate Commission action on a matter of surpassing importance to my payphone-provider clients — the setting of payphone compensation for several months of 1997 prior to the effective date of the per-call compensation plan. Indeed, such action is long overdue. Under current per-call rates, RBOC payphone providers are owed well over $200 million in compensation — an obligation that has been pending for three years. I ask your help in leading the Commission to resolve this issue now.

In this letter, we propose a resolution of this issue that is straightforward, requires no additional cost analysis by the Commission, and can be implemented without delay. We urge the Commission to adopt it as soon as possible.

Procedural Background

Traditionally, LEC payphones were supported by access charge elements included in the carrier common line charge. Among the provisions of the Telecommunications Act of 1996, section 276 directed the Commission to eliminate those access charge elements in favor of a system of per-call compensation to ensure that every payphone service provider ("PSP") would receive fair compensation for each payphone call. *See* 47 U.S.C. § 276(b)(1)(A), (B). In keeping with that statutory mandate, the Commission's original *Payphone Orders*[1] required LECs to eliminate, as of April 15, 1997, hundreds of millions of dollars of state and federal charges that were formerly used to support their payphones.

The FCC replaced those access charge elements with per-call compensation; however, the per-call compensation plan did not take effect immediately. Instead, the Commission instituted an interim compensation plan — to cover the period through October 7, 1997 — one that required IXCs to pay a per-payphone amount.[2] In the original *Payphone Orders*, the Commission calculated this obligation based on an estimate of the number of compensable calls made from the average payphone, multiplied by the per-call rate.[3] The Commission directed that this per-payphone amount be divided among IXCs with toll revenues in excess of $100 million, in proportion to those total toll revenues.[4]

In the same decision in which it vacated the original per-call rate, the D.C. Circuit also vacated the interim compensation plan.[5] The court gave three reasons for doing so. First, the Commission had not explained its decision to exclude IXCs with revenues under $100 million from the compensation plan. Second, the Commission had no evidence that total toll revenues provide a good proxy for determining the distribution of *payphone-originated* calls. Finally, the Commission wrongly excluded certain compensable calls from RBOC payphones from the plan. The D.C. Circuit accordingly vacated the interim compensation plan and remanded the issue to the FCC.[6]

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[1] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"); Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233 (1996) ("*Payphone Recon. Order*").

[2] *See First Payphone Order*, 11 FCC Rcd at 20601, ¶ 119.

[3] *Id.* at 20603-04, ¶¶ 124, 125.

[4] *Id.* at 20601, ¶ 119.

[5] *See Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*Payphones I*"), *cert. denied*, 523 U.S. 1046 (1998).

[6] *Id.* at 564-66.

Since the D.C. Circuit's decision in *Payphones I* was released on July 1, 1997, the Commission has not addressed the interim compensation issue. The amount of the unpaid interim obligations is well over *$200 million*, including interest. The Commission's failure to address this issue is a disservice to the industry. It is also inconsistent with the 1996 Act, which directed the Commission — within nine months of its enactment — to establish a per-call compensation plan that ensures that PSPs are compensated for "each and every" call made from their payphones. 47 U.S.C. § 276(b)(1)(A). Moreover, resolution of interim compensation is a necessary prerequisite for a true-up of amounts paid under the *Second Report and Order*.[7] We ask that the Commission bring the industry out of its state of suspension and remove uncertainty on these issues.

The parties have thoroughly addressed the interim compensation question in comments both before and after the Court's remand of the Commission's first payphone order. There is thus no procedural obstacle to immediate resolution of this issue. Moreover, with the passage of time, the Commission's task has actually become more straightforward, and should not require any undue commitment of resources.

The Solution:

With the benefit of hindsight, the Commission can address the D.C. Circuit's concerns simply by setting each carrier's interim compensation obligation based on the per-call compensation obligations actually incurred by the carrier during the corresponding period of the per-call compensation period in 1998. The Commission need not itself determine the amount of those obligations for each carrier. Instead, the Commission should simply establish the principle that each carrier must pay to each PSP, on a per-payphone basis, an amount for the interim period equal to the per-call compensation obligation incurred for that payphone during the corresponding per-call compensation period.[8] For payphones that were in service during the

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[7] Second Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 1778 (1997). IXCs were required to pay per-call compensation at the rate of $.284 from October 1997 until the FCC adjusted the per-call rate to $.24 in February 1999. In the *Third Report and Order*, the Commission stated that "IXCs may recover their overpayments to the PSPs at the same time as the PSPs receive payment from the IXCs for the Interim Period." Third Report and Order and Order on Reconsideration of the Second Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, 2636, ¶ 198 (1999).

[8] The amount of obligation incurred would of course be based on the new per-call compensation rate. To the extent carriers have already made interim payments, those amounts

interim period but removed from service thereafter, the Carrier would be required to pay compensation based on its overall average per-payphone payment.

This resolution would have several advantages. First, it would relieve the Commission of the need to allocate payment responsibilities among carriers.[9] Second, this resolution would leave it largely to the private parties to resolve their obligations, and permit them to come to agreements to deal with inaccuracies and anomalies.[10] Third, it would be both fair and accurate. Although individual payphones may have had varying numbers of compensable calls from month to month, there is no reason to believe that the overall number of such calls during the interim period differed significantly from the number of calls made immediately thereafter.

The Coalition is hopeful that this proposal will be accepted by everyone in the industry. Notably, the proposal builds on a suggestion by the largest IXC — AT&T — that interim compensation obligations be based on obligations actually incurred during the first two periods of per-call compensation.[11] And it is the most accurate method yet suggested for determining the obligations actually incurred by each and every carrier.

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would be credited towards satisfying their obligations.

[9] If the Commission were to stick with its original effort to calculate a per-payphone amount and divide that amount among carriers, it might be able to justify reliance on 800 toll revenues — as opposed to total toll revenues — as a proxy for the number of calls made from payphones. First, nearly two-thirds of compensable payphone calls are 800 calls. Second, the Commission could find that there is no reason to suppose that the distribution of 800 calls from payphones is significantly different from the distribution of 800 calls generally. In our view, however, there is no reason to use a proxy to divide compensation obligations when the actual data for 1998 is available.

[10] To the extent that there are continuing disputes concerning the number of compensable calls carried by a given carrier during the corresponding per-call compensation period, that carrier's obligations during the interim period would turn on the ultimate resolution of those disputes.

[11] *See* Letter of Len Cali, AT&T, to Lawrence E. Strickling, CC Docket No. 96-128 (Sept. 8, 1999) (copy attached hereto).

As noted, the Commission can issue an order to this effect without further delay. The Commission should press ahead promptly and remove this issue from its agenda once and for all. I would be pleased to work with you and with the Bureau staff to provide further clarification.

Sincerely,

Michael K. Kellogg

cc: Dorothy Attwood
Mary Beth Richards
Yog Varma
Lenworth Smith
Jon Stover
Lynne Milne
Al Barna
Tamara Preiss
Adam Dandub
Anna Gomez
Sarah Whitesell
Kyle Dixon
Rebecca Beynon
Jordan Goldstein